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No. 10-885

In The Supreme Court of the United States

ALEXIS WITT, on Behalf of the Estate of DEAN WITT, deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE PEACE THROUGH LAW FOUNDATION, THE MILITARY LAW COMMITTEE OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, AND THE METROPOLITAN WASHINGTON D.C. TRIAL LAWYERS FOUNDATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. The *Feres* Doctrine Deprives Those Who Defend Our Country of the Basic Right to Seek Redress Through the Judicial Process 5

A. In Situations Where a Private Citizen, or Even a Convicted Criminal, Could Seek Redress for Medical Malpractice, a Serviceperson Cannot 6

B. The Doctrine Has an Additional Negative Impact on Women and Children, Above and Beyond that Occasioned on Men 12

II. The FTCA Contains No "Feres" Exception, and the Court Should Take This Opportunity to Reverse *Feres*, or at Least Better Define the Doctrine's Limits 17

A. Both Houses of Congress Entertained Versions of the FTCA that Would Have Barred Servicepersons' Claims, but the Bill Ultimately Adopted Contained No Such Exception, Suggesting Congressional Intent to Permit Servicepersons' Claims 18

TABLE OF CONTENTS – Continued

Page

B. The *Feres* Court Tacitly Acknowledged that the Plain Language of the FTCA Did Not Exclude Claims of Servicepersons, Incident to Service or Otherwise 21

C. *Stare Decisis* Should Not Be Invoked to Perpetuate a Rule of Law that Sows Inequity, and Which Is Contrary to the FTCA's Plain Language and Apparent Legislative Intent..... 22

CONCLUSION..... 23

TABLE OF AUTHORITIES

Page

CASES

Atkinson v. United States, 825 F.2d 202 (9th Cir. 1987) 13

Baker v. Carr, 369 U.S. 186 (1962) 10

Bartley v. U.S. Dep't of Army, 221 F. Supp. 2d 934 (C.D. Ill. 2002) 15

Brooks v. United States, 337 U.S. 49 (1949) 3, 18, 19, 21, 22

Day v. Mass. Air Nat'l Guard, 167 F.3d 678 (1st Cir. 1999) 14

Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987) 13

Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001) 20

Dexheimer v. United States, 608 F.2d 765 (9th Cir. 1979) 14

Feres v. United States, 340 U.S. 135 (1950) ..... *passim*

Glenn Sr. v. Performance Anesthesia P.A., No. 5:09-CV-00309-BR, 2010 WL 3420538 (E.D.N.C. Aug. 27, 2010) 11

Helvering v. Hallock, 309 U.S. 106 (1940) 22

Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002) 17

Irvin v. United States, 845 F.2d 126 (6th Cir. 1988) 13

TABLE OF AUTHORITIES – Continued

Page

Lewis v. City of Chicago, Ill., 130 S. Ct. 2191 (2010) 17, 22

Mackey v. Milam, 154 F.3d 648 (6th Cir. 1998) 15

Mackey v. United States, 226 F.3d 773 (6th Cir. 2000) 15

Magwood v. Patterson, 130 S. Ct. 2788 (2010) 17

Minns v. United States, 155 F.3d 445 (4th Cir. 1998) 12, 13

Monaco v. United States, 661 F.2d 129 (9th Cir. 1981) 14

Montejo v. Louisiana, 129 S. Ct. 2079 (2009) 22

Mossow v. United States, 987 F.2d 1365 (8th Cir. 1993) 8, 14

Parker v. Levy, 417 U.S. 733 (1974) 10

Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) 16

Rayonier, Inc. v. United States, 352 U.S. 315 (1957) 7

Ricks v. Nickels, 295 F.3d 1124 (10th Cir. 2002) 14

Romero v. United States, 954 F.2d 223 (4th Cir. 1992) 8

Scales v. United States, 685 F.2d 970 (5th Cir. 1982) 13

Shiver v. United States, 34 F. Supp. 2d 321 (D. Md. 1999) 15

TABLE OF AUTHORITIES – Continued

Page

Skilling v. United States, 130 S. Ct. 2896 (2010) 17

Smith v. United States, 196 F.3d 774 (7th Cir. 1999) 14, 15

State Oil Co. v. Khan, 522 U.S. 3 (1997) 22

Stubbs v. United States, 744 F.2d 58 (8th Cir. 1984) 15

United States v. Johnson, 481 U.S. 681 (1987) 7, 9, 10, 12, 23

United States v. Muniz, 374 U.S. 150 (1963) 12

STATUTES

Federal Tort Claims Act, 28 U.S.C. § 1346, *et seq.* 2

28 U.S.C. § 1346(b) 2, 5, 6

28 U.S.C. § 2680(a) 10

28 U.S.C. § 2680(j) 10

28 U.S.C. § 2680(k) 10

28 U.S.C. § 2680(h) 10

Medical Malpractice Immunity Act, 10 U.S.C. §§ 1089 & 1091 11

Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356 (1948) 16

TABLE OF AUTHORITIES – Continued

Page

OTHER MATERIALS

1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* (Matthew Bender & Co. 2010) 6, 20

BETTIE J. MORDEN, WOMEN'S ARMY CORPS 1945-1978 (1990) 16

Exec. Order 10,240, 16 Fed. Reg. 3,689 (Apr. 27, 1951) 16

H.R. 12179, 68th Cong., 2d Sess. (1925) 20

H.R. 8914, 69th Cong., 1st Sess. (1926) 20

H.R. 5065, 72d Cong., 1st Sess. (1931) 20

Jonathan Turley, *Pax Militaris: The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1 (2003) 23

Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated* Feres *Doctrine*, 192 MIL. L. REV. 1 (2007) 23

Nicole Melvani, *The Fourteenth Exception: How the* Feres *Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 395 (2010) 23

S. 211, 72d Cong., 1st Sess. (1931) 20

Women in Military Service for America Memorial, http://www.womensmemorial.org/Education/diduknow.html (last visited Feb. 5, 2011) 16

INTEREST OF *AMICI CURIAE*[1]

The Peace Through Law Foundation ("PTLF"), the Military Law Committee of the Bar Association of the District of Columbia ("MLC-BADC"), and the Metropolitan Washington D.C. Trial Lawyers Foundation ("TLA-DC") respectfully submit this brief as *amici curiae*. PTLF is a charitable organization dedicated to assisting American servicepersons and their families through the rule of law. It currently benefits over 800 military members and families who have been victims of international terrorism. MLC-BADC is comprised of lawyers who have served in the military and who practice in, or are interested in, military law. Most of MLC-BADC's members periodically represent military members or their families in litigation against the United States. In 2008, MLC-BADC sponsored a resolution, which the American Bar Association approved, to provide that only the exceptions specifically provided in the Federal Tort Claims Act would limit active-duty military members' access to the courts when they are victims of tortious

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[1] No counsel for any party to this action authored any part of this brief, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. *See* SUP. CT. R. 37.6. Counsel of record for both parties were notified of *amici*'s intent to file this *amicus* brief ten days prior to filing pursuant to Rule 37. The parties have supplied letters consenting to the filing of this brief. Those letters are submitted with this brief.

government conduct. TLA-DC is also an organization that engages in charitable giving. It is comprised of lawyers who frequently represent military personnel in claims against the United States. All of these organizations believe the *Feres* doctrine is an unjust deprivation of the right of service members injured by negligence to seek judicial relief, and feel it is their duty to advocate for the elimination or limitation of the doctrine. All three *amici curiae* thus have an interest in the Court granting the petition and resolving the legal issue in this case.

SUMMARY OF THE ARGUMENT

In 1946, Congress passed the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 ("FTCA"), which waived the United States' liability for suits sounding in tort "under circumstances where the United States, if a private person, would be liable" to the claimant. The FTCA contained several exceptions. In 1950, the Court created the *Feres* doctrine, a new exception to the FTCA, which bars claims by military servicepersons if the claims are for injuries that arise out of or are in the course of activity incident to service, even if the claims are otherwise cognizable under the FTCA.

The *Feres* doctrine has created significant inequity. Among other things, the Courts of Appeals have construed the rule to bar all claims for malpractice by a serviceperson arising from the negligence of

personnel in military hospitals. The result is that the coincidence of being a military serviceperson can bar tort recovery in situations where a civilian would be entitled to seek proper compensation through the judicial process. This is such a case. The *Feres* doctrine also has an additional unfair impact on women and children associated with the military. Several courts have held that it bars claims by servicewomen for negligent prenatal care that harms their unborn children. Courts have also held the *Feres* doctrine bars claims arising from rape or sexual harassment perpetrated by one service member upon another. The rationales underlying the *Feres* doctrine do not justify these inequitable results.

The analytical foundation of the *Feres* doctrine is questionable. The legislative history suggests that Congress considered creating an exception similar to the *Feres* doctrine, but did not do so. Several of the bills that were precursors to the FTCA included exceptions similar to the *Feres* doctrine, but none of those became law. The Court tacitly admitted in *Feres v. United States*, 340 U.S. 135 (1950), and expressly admitted in *Brooks v. United States*, 337 U.S. 49 (1949), that the literal language of the FTCA did not allow for an exception covering claims by servicepersons, regardless whether the claim arose out of activities incident to service. Certain other provisions of the FTCA – those excluding from the FTCA claims for combatant activities and claims accruing while in foreign countries – show that Congress did not merely overlook the idea of claims by servicepersons. The *Feres*

doctrine is thus at odds with the language of the statute that Congress passed. Therefore, because the *Feres* doctrine yields severe inequitable results for servicepersons and their families, and because it appears to be contrary to Congress' intent, the Court should grant the petition and overrule *Feres v. United States* and its progeny.

ARGUMENT

In this case, a twenty-five-year-old American named Dean Witt ("SSgt. Witt") was killed by the gross negligence of a nurse providing post-operative care after an appendectomy. If SSgt. Witt had been a civilian, the hospital that employed the negligent nurse would likely have offered his family a settlement that properly compensated them for his death, or they would have been able to pursue their claims in court. SSgt. Witt, however, was a Staff Sergeant in the U.S. Air Force on extended leave, and the hospital was a military hospital. Based on these additional facts and the rule this Court formulated in *Feres v. United States*, 340 U.S. 135 (1950), the District Court and Court of Appeals concluded that SSgt. Witt's claim for medical malpractice was barred. Because SSgt. Witt chose to devote his life to protecting the people of the United States by serving in the military, his widow is denied a judicial remedy for the harms the United States caused through its grossly negligent hospital employee.

I. The *Feres* Doctrine Deprives Those Who Defend Our Country of the Basic Right to Seek Redress Through the Judicial Process.

The FTCA is a limited waiver of the United States' sovereign immunity from suit. Under it, one may sue the United States in

> civil actions on claims . . . for money damages . . . for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable. . . .

28 U.S.C. § 1346(b)(1). In *Feres*, the Court adopted a non-textual rule of law that bars such claims by military servicepersons if the claim is for "injuries [that] arise out of or are in the course of activity incident to service," even if the claim is otherwise cognizable under the FTCA. *Feres*, 340 U.S. at 146. Because SSgt. Witt was a military serviceman and the hospital was on a military base, the courts below concluded that the gross negligence was "incident to service," and that the *Feres* doctrine barred any suit for damages by SSgt. Witt's estate.

The result in this case is unfair to Mrs. Witt and her child, both of whom survived SSgt. Witt. This case is not an anomaly; it is the norm. As the petition sets forth, cases in which courts apply the *Feres* doctrine and reach the same inequitable result

reached in this case are legion. (Pet. for a Writ of Cert. 6-22.) Systemic inequity such as this, especially when the rule the courts are applying finds no support in the FTCA's text or legislative history, begs for correction. That this wrong endures in a time of war, when we ask the members of our military to risk all for their country, is shameful.

A. In Situations Where a Private Citizen, or Even a Convicted Criminal, Could Seek Redress for Medical Malpractice, a Serviceperson Cannot.

One tragic result that appears repeatedly in the case law is that of medical malpractice at a military hospital. Indeed, it was the same wrong underlying two of the three cases consolidated in *Feres v. United States*, 340 U.S. at 137, and it is the wrong present in this case. *See also* 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 5A.08[3] (Matthew Bender & Co. 2010) (collecting cases). The *Feres* doctrine uniformly bars such claims by servicepersons. The result in these cases is even more unfair and nonsensical than in most others.

Malpractice by a government health care provider is a perfect analog for malpractice by a civilian health care provider, and thus presents "circumstances where the United States, if a private person, would be liable to the claimant." 28 U.S.C. § 1346(b)(1). The Court in *Feres* found the analogy flawed, however, because there existed no situation in which a private

person could conscript an army, and it would thus be creating a new source of liability to allow claims by a military serviceperson against the United States. *See Feres*, 340 U.S. at 141-42. That rationale seems to presume that one employed in a private military force, if such a person were to exist, would be barred from suing his or her employer in tort. Private persons, however, are generally able to sue one another unless some specific rule of law prohibits it. Moreover, "[u]nder [the Court's] reasoning, . . . many of the Act's exceptions are superfluous, since private individuals typically do not" engage in the categories of conduct expressly excluded from the FTCA. *United States v. Johnson*, 481 U.S. 681, 694 (1987) (Scalia, J., dissenting). Regardless of the propriety of the rationale, however, the Court seemed to abandon it seven years later in *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957) ("It may be . . . 'novel and unprecedented' to hold the United States accountable for the negligence of its fire-fighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."). *See Johnson*, 481 U.S. at 688-91 (omitting reference to the "parallel private liability" rationale); *id.* at 694-95 (Scalia, J., dissenting). All that remains, then, are the nontextual policy bases for the *Feres* doctrine, none of which are compelling enough to justify finding an exception to the plain language of the FTCA that deprives men and women of our armed forces of the

right to seek redress for tortious wrongs committed by military doctors and nurses.

Applying the *Feres* doctrine in the medical malpractice context causes arbitrary results. In this case, SSgt. Witt was a serviceman on extended leave being treated for appendicitis – an ailment unconnected with his military service – in a military hospital. His claims for malpractice were thus barred. If SSgt. Witt was stricken ill while he was off base, however, and taken to a civilian hospital's emergency room where he suffered the same gross negligence, his estate would be entitled to assert against that hospital the claims that his family asserts here. If SSgt. Witt's wife or child had suffered the same negligence at the hands of the same nurse in the same military hospital, they would be entitled to bring a tort claim against the United States. *See, e.g.*, *Mossow v. United States*, 987 F.2d 1365, 1368 (8th Cir. 1993) ("[C]laims are not barred under *Feres* when brought by civilians or civilian dependents of service members who have sustained a direct injury from military personnel."). Moreover, if it had been SSgt. Witt's wife or child who had been the victim, SSgt. Witt might be entitled to bring his own claim against the United States for secondary effects of the nurse's negligence, such as loss of consortium. *See, e.g.*, *Romero v. United States*, 954 F.2d 223, 225 (4th Cir. 1992) (allowing a husband and wife, both service members, whose child suffered cerebral palsy as a result of a military

doctor's negligence, to recover for their own resulting mental anguish and financial burden).[2]

The three broad rationales for the *Feres* doctrine do not justify these bizarre results. First, it may "make[ ] no sense" for claims between servicepersons and the United States, whose relationship is "distinctively federal in character," to be resolved by reference to the law of the state where the alleged harm occurred, *Feres*, 340 U.S. at 143-44, and it may be difficult for servicepersons, who are "at peculiar disadvantage in litigation," to maintain claims, *see id.* at 145. But, oddities in choice-of-law rules and difficulties for plaintiffs who *want* to pursue tort claims seem like poor justifications for barring such claims. *See Johnson*, 481 U.S. at 695-96 (Scalia, J., dissenting) ("[U]nfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification, given that . . . nonuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery."). Next, although servicepersons are entitled to certain statutory benefits in the case of injury or death, *see, e.g.*, *Johnson*, 481 U.S. at 689-90 & n.10, such benefits are limited and do not provide full compensation for harms suffered. Service members, or their families, should be entitled to fair compensation for wrongful conduct by the United States' employees. And, it might be odd that Congress

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[2] The opinions by the various Courts of Appeals often reach inconsistent and varying results in these types of cases, as the petition discusses at length (Pet. for a Writ of Cert 11-18)

would not expressly provide for an offset for the statutory compensation that service members receive. *See id.* at 690. The Court, however, should not conclude that Congress intentionally omitted a set-off provision to justify finding that it accidentally omitted an exception for injuries incident to service.

The rationale that is generally considered the most compelling justification for the *Feres* doctrine is that suits by military servicepersons against other government employees might enmesh the judiciary in "sensitive military affairs at the expense of military discipline." *Id.* at 690. A suit by a soldier against a superior for a negligent order, for instance, might become a trend and wreak havoc on the military chain of command, disrupting the military's "specialized society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). This concern, however, does not justify adding additional, non-textual exceptions to the FTCA. Congress provided what it believed was necessary to avoid these military-discipline concerns by including exceptions in the FTCA's text. *See* 28 U.S.C. § 2680(a) (discretionary-function exception); 28 U.S.C. § 2680(j) (combatant-activities exception); 28 U.S.C. § 2680(k) (foreign-country exception); 28 U.S.C. § 2680(h) (intentional-torts exception).[3] Moreover, malpractice

[3] Cases raising serious chain-of-command concerns might warrant dismissal under the political-question doctrine, as such claims could "involve . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

claims against a military hospital will rarely, if ever, pose a risk to military discipline. In this case, for example, the nurse whose gross negligence harmed SSgt. Witt was not his superior, and SSgt. Witt would have needed an appendectomy even if he were not a serviceman. The only link between the suit and SSgt. Witt's military service is that, because he was in the Air Force, he went to a military hospital for treatment. He is not questioning the competence or control of his superiors or of the government. Such is usually, if not always, the case when the service member's claim is for medical malpractice.

The military-discipline rationale is even more untenable in cases like *Glenn Sr. v. Performance Anesthesia P.A.*, No. 5:09-CV-00309-BR, 2010 WL 3420538 (E.D.N.C. Aug. 27, 2010), in which the negligent medical professional is a civilian contractor who has been "deemed" a United States employee under the Medical Malpractice Immunity Act, 10 U.S.C. §§ 1089 & 1091 ("MMIA"). *See Glenn Sr.*, 2010 W.L. 3420538, at *5 ("[P]ursuant to the [MMIA], health care providers who serve under a personal services contract authorized by the U.S. Secretary of Defense are deemed to be employees of the government for the purpose of disposing of personal injury claims."). In such cases, the plaintiff is alleging negligence on the part of a civilian, and is asserting claims against the United States – rather than the individual – only because a federal statute requires it. Such claims are even less likely to raise

military-discipline concerns than claims against doctors who are members of the military.

The Court should not perpetuate a rule that has a net result of treating our military servicepersons as second-class citizens. Non-military citizens, including convicted criminals serving their prison sentences, may bring tort claims against the Government. *See Johnson*, 481 U.S. at 696 (Scalia, J., dissenting); *United States v. Muniz*, 374 U.S. 150, 150 (1963). Why should we afford our soldiers, sailors, airmen, and marines less right to redress wrongs than our felons possess? It is unfair that those who serve and risk their lives to protect us should have the judicial remedy taken from them because of that service. The Court should reconsider whether the policies supporting the *Feres* doctrine truly justify the inequity it creates.

B. The Doctrine Has an Additional Negative Impact on Women and Children, Above and Beyond that Occasioned on Men.

The *Feres* doctrine has an added unfair effect on women and children. In addition to claims that a male serviceperson might bring, many Courts of Appeals have held *Feres* to bar claims by women for negligence that harms their unborn children. In *Minns v. United States*, the Fourth Circuit barred suit by the wives of several soldiers who served in the first Gulf War, in which they alleged that the

government's intentional exposure of their husbands to toxic chemicals caused birth defects in their children. *See* 155 F.3d 445, 449-51 (4th Cir. 1998).

The inequity is even greater for servicewomen who become pregnant while on active duty. In *Irvin v. United States*, for example, the Sixth Circuit barred a claim for negligent prenatal care given to an active-duty servicewoman that resulted in the death of her newborn child. *See* 845 F.2d 126, 129-30 (6th Cir. 1988). Other Courts of Appeals have come to the same conclusion regarding negligent-prenatal-care claims. *See Del Rio v. United States*, 833 F.2d 282, 287-88 (11th Cir. 1987) (holding an active-duty Navy servicewoman barred from bringing claim for wrongful death of her son caused by negligent prenatal care at military hospital, but not barred from bringing claims as representative of her sons); *Atkinson v. United States*, 825 F.2d 202, 206 (9th Cir. 1987) (grudgingly holding an active-duty army servicewoman barred from bringing malpractice claim against military doctor related to prenatal care resulting in stillbirth of child). Many courts have also found that *Feres* bars recovery by the children who are harmed by negligent military doctors, leaving the family with no judicial recourse. *See Irvin*, 845 F.2d at 131 (holding claims by deceased child barred because "the claim ha[d] its 'genesis' in an injury to a serviceperson incident to military service."); *Scales v. United States*, 685 F.2d 970, 973 (5th Cir. 1982) (barring claim by child born with congenital rubella syndrome against the military hospital where his mother received

prenatal care); *Monaco v. United States*, 661 F.2d 129, 133-34 (9th Cir. 1981) (barring claim by serviceman's daughter for birth defects allegedly caused by serviceman's exposure to radiation during service). *But see Mossow*, 987 F.2d at 1368 ("[C]laims are not barred under *Feres* when brought by civilians or civilian dependents of service members who have sustained a direct injury from military personnel."). These results are unfair to the servicewomen and to the children, and might also provide a deterrent to military service.

The *Feres* doctrine has also been found to bar servicewomen's claims based on sexual harassment and sexual assault by other service members.[4] One of the most egregious examples is *Smith v. United States*, in which an Army private alleged that she was repeatedly raped by her drill sergeant over the course of several months. *See* 196 F.3d 774, 775-76 (7th Cir.

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[4] This problem is not felt solely by women, as some cases demonstrate, *see Ricks v. Nickels*, 295 F.3d 1124, 1127, 1133 (10th Cir. 2002) (barring a serviceman's claim based on sexual assaults by servicepersons acting as guards while plaintiff was imprisoned for a general court martial); *Day v. Mass. Air Nat'l Guard*, 167 F.3d 678, 680 (1st Cir. 1999) (barring a serviceman's claim based on sexual assault that occurred during a hazing incident by other servicepersons); *Dexheimer v. United States*, 608 F.2d 765, 767 (9th Cir. 1979) (barring a serviceman's claim based on sexual assault by other inmates while imprisoned for a general court martial), but it appears to impact women more frequently and more severely. Moreover, denying recovery for such claims is an intolerably unfair result regardless of the victim's gender.

1999). She sought to bring a negligent supervision claim against the United States based on those sexual assaults. *See id.* Even though each of the alleged rapes occurred off base and while both service members were off duty, the Seventh Circuit held that *Feres* barred the claim. *See id.* at 777-78. Shortly after *Smith*, the Central District of Illinois found that *Feres* barred similar claims by eight servicewomen against the U.S. Department of the Army. *See Bartley v. U.S. Dep't of Army*, 221 F. Supp. 2d 934, 948-49 (C.D. Ill. 2002). The plaintiffs in *Bartley* brought several claims, including negligent training and supervision, alleging "that they . . . suffered continuing harassment and retaliation, including rape, sodomy, unwelcome sexual advances and touching, requests for sexual favors, sexual innuendos, harassing phone calls, threats of physical harm, nonconsensual sex and duress." *Id.* at 936. Relying on the *Feres* doctrine, the district court dismissed all tort claims. *See id.* at 957. *See also Mackey v. United States*, 226 F.3d 773, 775 (6th Cir. 2000) (barring an Air Force captain from bringing claims of sexual harassment against her two immediate superior officers); *Mackey v. Milam*, 154 F.3d 648, 648 (6th Cir. 1998) (better describing the factual allegations in *Mackey v. United States*); *Stubbs v. United States*, 744 F.2d 58, 60-61 (8th Cir. 1984) (barring claims on behalf of the estate of a Army servicewoman who committed suicide as the alleged result of sexual harassment by her drill sergeant); *Shiver v. United States*, 34 F. Supp. 2d 321, 322 (D. Md. 1999) (barring claims by a servicewoman arising out of an alleged

rape by her drill sergeant while on duty). Sexual assault and harassment can have a devastating effect on the victim. These women should not be denied relief based on an exception that finds no place in the FTCA's text.

The relationship between women and the armed forces has changed dramatically in the past sixty years, providing yet another reason for the Court to reconsider its decision in *Feres*. The Court decided *Feres* two years after Congress passed the Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356 (1948). At that time, there were approximately 50,000 women in the armed forces, which "constituted little more than 1% of the total force." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 270 n.21 (1979). "By 1975, . . . the percentage had risen to 4.6%." *Id.* The number continues to grow. A recent estimate places the number of female servicepersons at 350,000 – seven times more than in 1950. *See* Women in Military Service for America Memorial, http://www.womensmemorial.org/Education/diduknow.html (last visited Feb. 5, 2011). Moreover, from 1951 to 1975, the armed forces could discharge women who became pregnant during their service, so issues related to pregnant servicewomen were essentially nonexistent. *See* Exec. Order 10,240, 16 Fed. Reg. 3,689 (Apr. 27, 1951); BETTIE J. MORDEN, WOMEN'S ARMY CORPS 1945-1978 at 377 (1990). The Court could not have anticipated the nature and severity of the unfair impact *Feres* would have on women over the next sixty years.

II. The FTCA Contains No "Feres" Exception, and the Court Should Take This Opportunity to Reverse *Feres*, or at Least Better Define the Doctrine's Limits.

Several times in the past year, members of the Court have expressed a strong conviction that the Court's duty with respect to legislation is to apply unambiguous statutory text as it is written. Although discussing a different statute, this Court stated last term: "It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago, Ill.*, 130 S. Ct. 2191, 2199-2200 (2010) (Scalia, J.). *See also Magwood v. Patterson*, 130 S. Ct. 2788, 2798 (2010) (Thomas, J.) ("We cannot replace the actual text with speculation as to Congress' intent. . . . Therefore, although we agree with the State['s argument,] that does not entitle us to rewrite the statute. . . ."); *Skilling v. United States*, 130 S. Ct. 2896, 2940 (2010) (Scalia, J., joined by Thomas and Kennedy, JJ., dissenting) (" . . . I do not believe we have the power, in order to uphold an enactment, to rewrite it."); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 833 (2002) (Scalia, J.) ("Our task . . . is not to determine what would further Congress's goal . . . , but to determine what the words of the statute must fairly be understood to mean."). The Court should consider whether to continue supporting the *Feres* doctrine against this backdrop.

A. Both Houses of Congress Entertained Versions of the FTCA that Would Have Barred Servicepersons' Claims, but the Bill Ultimately Adopted Contained No Such Exception, Suggesting Congressional Intent to Permit Servicepersons' Claims.

In *Brooks v. United States*, the Court took note of legislative history that suggests that the Congress of 1946, which adopted the FTCA, had contemplated – and rejected – the idea of barring claims by servicepersons. The Court stated:

> More than the language and framework of the act support th[e] view [that the FTCA includes claims by servicepersons]. There were eighteen tort claims bills introduced in Congress between 1925 and 1935. All but two contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act was first introduced, the exception concerning servicemen had been dropped. . . . When H.R. 181 was incorporated into the Legislative Reorganization Act, the last vestige of the exclusion for members of the armed forces disappeared.

Brooks, 337 U.S. at 51-52. The Court found that legislative history persuasive in concluding that Congress considered, and rejected, the idea of barring claims by servicepersons. The Court also found persuasive that the statute, as enacted, included exceptions for combatant activities and activities in foreign countries, which would presumably cover a broad

swath of claims by military servicepersons for injuries incident to service. *See id.* at 51. In *Feres*, the Court seemed unimpressed by the legislative history that it discussed in *Brooks*. It mentioned that history in outlining the servicepersons' arguments, at which time it also acknowledged the existence of the combatant-activity and foreign-country exceptions found in the statute's text, but it did not directly address any of these points. *See Feres*, 340 U.S. at 138-39.

The United States may argue that, if Congress did not intend the *Feres* doctrine to be part of the FTCA, it could have passed a law overruling the decision. The Court in *Feres* used that fact to justify deviating from the statutory language when it stated: "[I]f we misinterpret the Act, at least Congress possesses a ready remedy." *Feres*, 340 U.S. at 138. To some extent, that is true; Congress has the power to legislatively overrule *Feres v. United States*. But referring to legislation as "a ready remedy" does not properly acknowledge the many difficulties involved in getting a statute drafted, passed by both houses of Congress, and signed by the President. More importantly, however, the argument proposes an unfair burden-shift. At least in the context of a comprehensive statutory scheme like the FTCA, Congress should not have to un-make a rule that it did not create. The Court should not find the lack of congressional action decisive, and should not wait for others to fix a problem it created.

Some of the tort claims bills introduced in Congress prior to the enactment of the FTCA establish

that Congress considered a rule much like the *Feres* doctrine, but did not enact it. Several bills would have barred "claims of persons in the military forces for injury received in the line of duty or for which relief is provided by other law." Jayson & Longstreth, *supra*, § 2.09[8] & n.13 (citing H.R. 12179, 68th Cong., 2d Sess. (1925); H.R. 8914, 69th Cong., 1st Sess. (1926); S. 211, 72d Cong., 1st Sess. (1931); H.R. 5065, 72d Cong., 1st Sess. (1931)). Other bills would have barred "claims arising out of negligence of any employee of a government hospital, . . . or of any physician, surgeon, nurse, or orderly in connection with the rendition of medical or surgical treatment." Jayson & Longstreth, *supra*, § 2.09[8] & n.16 (citing S. 211, 72d Cong., 1st Sess. (1931); H.R. 5065, 72d Cong., 1st Sess. (1931)). Yet another bill would have barred "claims of persons receiving compensation under the provisions of any of the acts providing compensation to federal employees for the same injury." Jayson & Longstreth, *supra*, § 2.09[8] & n.12 (citing H.R. 8914, 69th Cong., 1st Sess. (1926)). Congress adopted none of these bills, and the FTCA that was enacted contained none of these exclusions. That Congress contemplated a *Feres*-like rule and did not adopt it casts doubt on the notion that the *Feres* doctrine is consistent with legislative intent. *See, e.g.*, *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 n.7 (2001) ("Although as a general rule we are hesitant to construe statutes in light of legislative inaction . . . , we note that Congress has twice considered specific proposals to protect Indian trust information[.] We do so because these proposals confirm

the commonsense reading that we give Exemption 5[.]") (citation omitted).

B. The *Feres* Court Tacitly Acknowledged that the Plain Language of the FTCA Did Not Exclude Claims of Servicepersons, Incident to Service or Otherwise.

The plain language of the FTCA does not exclude claims by servicepersons, even for claims arising from activities incident to service. The Court in *Feres* tacitly admitted that it did not. *See Feres*, 340 U.S. at 140-41 ("[The FTCA] confers jurisdiction to render judgment upon all such claims. * * * But it does not say that all claims must be allowed."). One year earlier, in *Brooks v. United States*, the Court said so expressly: "The statute's terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve exceptions. None exclude petitioners' claims." *Brooks*, 337 U.S. at 51. The *Brooks* Court, in *dicta*, admitted that a *Feres*-type rule would be a deviation from the plain language of the FTCA: "The Government's fears may have point in reflecting congressional purpose to leave injuries incident to service where they were, *despite literal language and other considerations to the contrary*." *Brooks*, 337 U.S. at 53 (emphasis added). In other words, this Court acknowledged, before it created the *Feres* doctrine, that the doctrine would be inconsistent with

the FTCA's "literal language." *Id.* The *Feres* doctrine is a result of the Court "rewrite[ing] the statute so that it covers only what [the Court thought was] necessary to achieve what [the Court thought] Congress really intended." *Lewis*, 130 S. Ct. at 2199-2200. The Court should restore the statute to reflect the text that Congress wrote.

C. *Stare Decisis* Should Not Be Invoked to Perpetuate a Rule of Law that Sows Inequity, and Which Is Contrary to the FTCA's Plain Language and Apparent Legislative Intent.

Adoption of the *Feres* doctrine was contrary to Congress' intent in drafting the FTCA and the unfair results of its application outweigh any benefit derived from retaining the doctrine. The Court should therefore take this opportunity to consider whether *Feres* and its progeny should be overruled. As the petition notes, "*stare decisis* 'is a principle of policy and not a mechanical formula of adherence,' *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), adherence to precedent must yield to reasoned reconsideration when 'the analytical underpinnings [of a holding are] substantially weakened,' *State Oil Co. v. Khan*, 522 U.S. 3, 14 (1997)[.]" (Pet. for a Writ of Cert 6.) *See also Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009) ("Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the

decision was well reasoned."). As explained above, as set forth in the dissenting opinion in *Johnson*, 481 U.S. at 692-703, and as set forth in the petition, there are good reasons to question the workability and analytical underpinnings of the *Feres* doctrine. *See also* Nicole Melvani, *The Fourteenth Exception: How the* Feres *Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 395 (2010); Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated* Feres *Doctrine*, 192 MIL. L. REV. 1 (2007); Jonathan Turley, *Pax Militaris: The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 6-27 (2003). The Court should grant the petition and re-analyze the doctrine with the benefit of full briefing and argument.

CONCLUSION

Every day, in airports all across the country, ordinary citizens spontaneously stand up and applaud as our soldiers, sailors, airmen and marines return from war. It is a small but heartfelt gesture by a grateful people. Now we ask this Court to stand up for the legal rights of those who go in harm's way on our behalf.

For the reasons set forth in this brief, and those set forth in the petition, the *amici curiae* ask the

Court to **GRANT** the petition and overrule *Feres v. United States*.

Respectfully submitted,

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